APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED DECEMBER 4, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3151

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG; GREGORY SCOTT; GERALDINE FELDMAN; PATRICIA BOWERS; ROBERT J. FULTON, JR., BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 98-cv-05557)

BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education;

---

* Amended Pursuant to F.R.A.P 43(c)

Appendix A

THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 99-cv-00822)

Board of Education of the Township of Branchburg; Gregory Scott; Geraldine Feldman; Patricia Bowers; Robert J. Fulton, Jr.,

Appellants

Nos. 01-3152 and 01-3153

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG; GREGORY SCOTT; GERALDINE FELDMAN; PATRICIA BOWERS; ROBERT J. FULTON, JR., BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 98-cv-05557)

---

* Amended Pursuant to F.R.A.P 43(c)

Appendix A

BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 99-cv-00822)

David Livingston; William L. Librera*,

Appellants

No. 01-3217

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG; GREGORY SCOTT; GERALDINE FELDMAN; PATRICIA BOWERS; ROBERT J. FULTON, JR., BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education;

---

* Amended Pursuant to F.R.A.P 43(c)

Appendix A

THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 98-cv-05557)

BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 99-cv-00822)

The Board of Education of the Borough of Somerville,

Appellant

No. 01-3334

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG; GREGORY SCOTT; GERALDINE FELDMAN; PATRICIA BOWERS; ROBERT J. FULTON, JR.; BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

---

* Amended Pursuant to F.R.A.P 43(c)

Appendix A

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 98-cv-05557)

BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 99-cv-00822)

Beth Kovacs; Christine Ihling; Steven Jankoski,

Appellants

No. 01-3413

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG; GREGORY SCOTT; GERALDINE FELDMAN; PATRICIA BOWERS; ROBERT J. FULTON, JR., BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

---

* Amended Pursuant to F.R.A.P 43(c)

Appendix A

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 98-cv-05557)

BETH KOVACS; CHRISTINE IHLING; STEVEN JANKOSKI

v.

DAVID LIVINGSTON, Somerset County Superintendent; WILLIAM L. LIBRERA*, State Commissioner of Education; THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey

(D.C. No. 99-cv-00822)

The Board of Education of the Borough of Somerville,

Appellant

---

* Amended Pursuant to F.R.A.P 43(c)

Appendix A

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Nos. 98-cv-05557 and 99-cv-00822)
District Judge: Hon. Anne E. Thompson

Submitted Under Third Circuit LAR 34.1(a)
July 25, 2002

Before: SLOVITER, NYGAARD, and BARRY, *Circuit Judges*

(Filed: December 4, 2002)

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

In *English v. Board of Education of Boonton*, 301 F.3d 69, 81 (3d Cir. 2002), this court held that the New Jersey statute providing for no more than one representative of a sending school district to participate on the receiving district's board of education did not violate the one person, one vote constitutional requirement. The issue this case presents is whether *English* applies when the sending school district cannot withdraw from its send-receive relationship.

I.

The Township of Branchburg School District and the Borough of Somerville School District, nearby towns in New Jersey, entered into a "send-receive" relationship in 1956 for the education of Branchburg high school students, a relationship authorized and governed by New Jersey statute.

See N.J. Stat. Ann. § 18A:38-8 (West 1999). Under New Jersey law, each school district has an obligation to educate the students in its district from K through 12 at its own expense. *See id.* § 18A:38-1 (Attendance at school free of charge). The send-receive relationship enables Branchburg to fulfill its statutory obligation to educate its high school students by sending them to Somerville High School and paying the Somerville School District tuition that reflects the "actual cost" of educating the students. *See id.* § 18A:38-19. However, under New Jersey law, Branchburg residents are entitled to the representation of only one member on the ten-member Somerville Board of Education ("Somerville Board"), despite the fact that Branchburg students comprise more than half of the enrollment at Somerville High School. *See id.* § 18A:38-8.2.

The Board of Education of the Township of Branchburg and four Branchburg residents ("Branchburg Appellants") brought this action in the District Court for the District of New Jersey claiming that N.J. Stat. Ann. § 18A:38-8.2 violates the "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. The District Court granted the Branchburg plaintiffs' motion for summary judgment and denied summary judgment requested by the defendants, the Somerville Board, the State Commissioner of Education, and the Somerset County Superintendent, holding that the send-receive statute was unconstitutional as applied to Branchburg. App. at Pa14 (*Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. Sept. 5, 2000)). The District Court ordered an interim remedial plan that increased the size of the Somerville Board to 15 members and increased

Branchburg's representation on that Board to six members, out of the 15, with the right to vote on issues affecting Branchburg high school students. App. at Pa17-29 (*Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. May 22, 2000)). The interim plan was to remain in effect until the New Jersey state legislature passed new legislation to address the matter. *Id.*

The Branchburg Appellants seek appellate review of the District Court's orders dated May 22, 2001 and July 2, 2001 limiting interim relief to the addition of six members to the Somerville Board. The Somerville Appellees cross appeal the District Court's orders dated September 5, 2000, May 22, 2001, and July 2, 2001 granting Branchburg summary judgment and instituting the interim remedial plan.[1]

---

1. The parties have filed notices of appeal from various orders of the District Court. In No. 01-3151, the Branchburg plaintiffs appeal the District Court's order dated May 22, 2001, creating the interim plan for increasing Branchburg representation on the Somerville Board to six members and the July 2, 2001 order denying reconsideration of the interim plan.

In No. 01-3152, the Somerville defendants appeal the same two orders. In No. 01-3153, the Somerville defendants cross appeal from the District Court's order of September 5, 2000, granting summary judgment for the plaintiffs holding the New Jersey statute unconstitutional, and also include in their notice appeals from the May 22, 2001 and July 2, 2001 orders. In No. 01-3217, the Somerville Board of Education cross appeals from the same orders as in No. 01-3153.

In No. 01-3334, Beth Kovacs, Christine Ihling and Steven Jankoski (hereafter "Kovacs Plaintiffs") appeal the District Court's

(Cont'd)

Appendix A

II.

FACTS AND PROCEDURAL BACKGROUND

Much of the material that follows is set forth in *English* but is included here to provide background for our ultimate holding.

The New Jersey public school system is organized in geographical units called school districts. Under New Jersey law, a school district that chooses not to develop high school facilities must designate a high school outside the district to receive its high school students. N.J. Stat. Ann. § 18A:38-11. Correspondingly, a school district may receive students from outside its district. *Id.* § 18A:38-8. An agreement between two school districts whereby one district sends its high school students to attend a school in another district is commonly called a "send-receive" relationship.

Once two communities establish a send-receive relationship, the sending district becomes entitled to one representative on the receiving district's school board if its students comprise at least 10 percent of the total enrollment, in the applicable grades, of the receiving school.

(Cont'd)

July 23, 2001 order denying their summary judgment motion for an interim remedy for voters' rights in Somerville school budget and bond elections.

In No. 01-3413, the Somerville Board cross appeals the District Court's orders dated September 5, 2000 and July 23, 2001.

Id. § 18A:38-8.2a (2).[2] If the students from the sending district comprise less than 10 percent of the receiving school's total enrollment, the sending district is not entitled to any representation on the receiving district's school board. *Id.* § 18A:38-8.2a(1). Conversely, even if the students from the sending district greatly exceed 10 percent of the receiving school's enrollment, the sending district is limited to a maximum of one representative on the receiving district's school board.

The Branchburg and Somerville school districts are non-contiguous communities in Somerset County, New Jersey. In 1956, they entered into a send-receive relationship.

2. A school district which is sending pupils to another school district pursuant to N.J.S. 18A:38-8 shall have representation on the board of education of the receiving school district as follows:

> a.(1) If the pupils of the sending district comprise *less than 10 percent* of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have *no* representation on the receiving district board of education.
>
> (2) If the pupils of the sending district comprise *at least 10 percent* of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have *one representative* on the receiving district board of education.

Id. § 18A:38-8.2 (emphasis added).

Appendix A

The agreement allowed Branchburg high school students to attend Somerville High School in return for tuition payments from the Branchburg district to cover the costs of the students' education. When the agreement was made it fit the needs of both communities because Branchburg lacked high school facilities and Somerville had excess capacity in its school facilities.

Since the formation of the send-receive relationship, Branchburg's population has grown substantially. Based on the 2000 federal census, Branchburg's population of 14,566 residents now exceeds Somerville's population of 12,423 residents. Consequently, the students from the Branchburg district attending Somerville High School comprise approximately 53 percent of the High School's enrollment. For the 1999-2000 school year, 428 Branchburg students attended Somerville High School compared to 377 Somerville students. At the time the District Court heard evidence, residents of the Branchburg district were projected to pay $4,872,846 dollars in property taxes to the Somerville Board to cover the education costs for Branchburg students during the 2000-2001 school year.

Despite the fact that Branchburg students comprise a majority of the enrollment at Somerville High School, under the New Jersey statute Branchburg may only appoint one representative to the ten-member Somerville Board. *See* N.J. Stat. Ann. § 18A:38-8.2a (2). The Branchburg representative is entitled to vote on certain issues involving the High School,

including capital spending and teacher dismissals.[3] The votes of each member of the Somerville Board are weighted equally.

Beginning in 1970, the Branchburg and Somerville districts initiated discussions to terminate the relationship. There are three methods for severing a send-receive relationship in New Jersey, and Branchburg has tried all three, unsuccessfully. First, in September 1975, the Branchburg Board filed a petition with the State Commissioner of Education to withdraw from its send-receive relationship

---

3. N.J. Stat. Ann. § 18A:38-8.1 states that a sending district's representative is eligible to vote on the following:

> a. Tuition to be charged the sending district by the receiving district and the bill lists or contracts for the purchase, operation or maintenance of facilities, equipment and instructional materials to be used in the education of the pupils of the sending district;
>
> b. New capital construction to be utilized by sending district pupils;
>
> c. Appointment, transfer or removal of teaching staff members providing services to pupils of the sending district, including any teaching staff member who is a member of the receiving district's central administrative staff; and
>
> d. Addition or deletion of curricular and extra-curricular programs involving pupils of the sending district.

with Somerville. Under N.J. Stat. Ann. § 18A:38-13, the Commissioner may approve a petition for severance only if "no substantial negative impact will result therefrom." The Commissioner denied Branchburg's petition, finding that severance of the send-receive relationship would have, among other things, negative financial implications for the two districts involved. The Commissioner's decision was affirmed by both the New Jersey State Board of Education and the New Jersey Superior Court, Appellate Division. *Bd. of Educ. of Branchburg Twp. v. Bd. of Educ. of Somerville*, 414 A.2d 259, 263 (N.J. Super. App. Div. 1980). The court held that the agency's factual determinations, that severance would negatively impact the districts by creating a "virtually all-white school" in Branchburg and increasing the educational costs of both districts, were amply supported by the record. *Id.* at 262-63.

The remaining two options available for terminating a send-receive relationship require the creation of either an "all purpose" regional school district or a "limited purpose" regional school district under N.J. Stat. Ann. § 18A:13-2. The formation of a regional school district likely would improve Branchburg's representation by creating a new school board. *See Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood*, 608 A.2d 914, 948 (N.J. Super. App. Div. 1992) ("Regionalization, on the other hand, involves the formation of an entirely new school district governed by a separate board of education.").

In 1996, Branchburg and Somerville conducted a feasibility study for an "all purpose" regional school district. The experts retained for the study concluded that the disad-

vantages of a regional school outweighed the advantages. Similarly, in 1999, Branchburg, this time at the direction of an order by the District Court, conducted a feasibility study for a "limited purpose" 9-12 regional school district. App. at Pa67-69 (*Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. April 9, 1999); *Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. May 4, 1999)). Again, the experts recommended against the development of a regional school district. Thus, both parties agree that Branchburg cannot withdraw from the send-receive relationship in the foreseeable future.

The Branchburg Board of Education and four individual residents of Branchburg brought suit in the United States District Court for the District of New Jersey against the Somerville School Board, the State Commissioner of Education, and the Somerset County Superintendent. The Branchburg Appellants alleged that N.J. Stat. Ann. § 18A:38-8.2 was unconstitutional as applied to Branchburg because it violated the "one person, one vote" principle of the Fourteenth Amendment of the United States Constitution, by denying Branchburg proportional representation on the Somerville Board. Similarly, Beth Kovacs, Christine Ihling, and Steven Jankoski (hereafter "Kovacs Plaintiffs") brought suit in the same District Court alleging that the New Jersey statute in question violated their Fourteenth Amendment rights by denying Branchburg residents the right to vote along with Somerville residents in Somerville school budget and referenda elections.

Appendix A

The parties filed cross motions for summary judgment, and the District Court granted summary judgment to the Branchburg plaintiffs. App. at Pa10-16 (*Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. Sept. 5, 2000)). The Court held that N.J. Stat. Ann. § 18A:38-8.2 was unconstitutional as applied "because it denies Branchburg citizens the right to elect representatives to oversee the high school education of their children in contravention of the 'one person, one vote' principle." *Id.* at Pa14. The District Court ordered an interim remedy that increased Branchburg's representation on the Somerville Board to six members, out of a total of 15 members, and granted the new members an equal vote on issues affecting Branchburg high school students. App. at Pa17-18 (*Bd. of Educ. of Branchburg v. Livingston*, No. 98-5557 (D.N.J. May 22, 2000)). The Branchburg Appellants have appealed the District Court's interim remedy, and the Somerville defendants have cross appealed both the District Court's holding that N.J. Stat. Ann. § 18A:38-8.2 is unconstitutional and the Court's interim remedy.

Appendix A

III.

DISCUSSION

A. Jurisdiction and Standard of Review

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291 to review a district court's final judgment.[4] Our review of a district court's grant of summary judgment is plenary, applying the same standard used by the district court. *English*, 301 F.3d at 75-76. A grant of summary judgment will be upheld if "there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law." *English*, 301 F.3d at 76 (citations omitted); *see* Fed. R. Civ. P. 56(c).

B. The Effect of the *English* Decision

We used a two-step analysis in *English* to determine whether N.J. Stat. Ann. § 18A:38-8.2 violates the Equal Protection Clause. First, we considered whether we should review the statute under strict scrutiny or rational basis review. We concluded that rational basis review of the

---

4. Our jurisdiction is limited to review of the District Court's grant of summary judgment to the Branchburg plaintiffs and the Court's interim remedy. The Notice of Appeal of the Kovacs Plaintiffs from the District Court's order of July 23, 2001 denying their motion for summary judgment for more extensive interim relief is not appealable and will be dismissed. However, their position (presented to the District Court) is considered in the text in conjunction with the appeals properly before us.

limitation of representation on the receiving district's board was appropriate because the receiving district was not exercising the same governmental powers over the sending district as it does over its own residents. *English*, 301 F.3d at 77-79. Second, we analyzed whether New Jersey had a rational basis for granting sending districts no more than one representative on the receiving district's school board. We concluded that the New Jersey legislature has legitimate reasons for limiting the representation of sending districts in the decisions of the receiving district's board. *Id.* at 82-83.

The facts in *English* are nearly identical to the facts in the present case. In both cases, the district sending its students to the receiving school made up more than 50 percent of the school's enrollment but, due to New Jersey law, the sending district is limited to one representative on the receiving district's school board. Branchburg does not allege that the Somerville Board exerts any powers beyond those at issue in *English*.

Due to the extensive similarities with *English*, Branchburg is limited to two grounds for distinguishing its case. First, Branchburg, the sending district, unlike the sending district in *English*, has already attempted several times to sever the send-receive agreement and its efforts have been rejected. Consequently, Branchburg argues that there is not a rational basis for limiting its representation on the Somerville Board because its relationship with Somerville High School is permanent and Branchburg residents share a long-term interest in the school equivalent to the interests of Somerville residents.

Second, the Kovacs Plaintiffs argue that the remedy they seek is unique and was not presented in *English*. They argue that they are not only seeking additional representation on the Somerville Board, but also the right to vote on the annual Somerville High School budget and any referenda affecting the High School.

C. Effect of Branchburg's Inability to Sever the Send-Receive Relationship

Branchburg argues that the rational basis standard of review applied in *English* is inapplicable here because it has been unable, and will continue to be unable for the foreseeable future, to sever its relationship with Somerville. It also argues that the conclusion reached in *English* that the New Jersey statute has a rational basis should not govern this case for the same reason. We reject both arguments.

In *English*, we acknowledged that the denial of an equal voice in elections generally is reviewed under strict scrutiny. 301 F.3d at 76. We noted, however, that the Supreme Court has identified exceptions to that standard of review, including "geography-based restrictions on the franchise . . . when a municipality exercises 'extraterritorial' powers over individuals outside its boundaries[.]" *Id.* at 72 (citing *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69 (1978)). Such voting restrictions on non-residents, even if the actions by the elected body inevitably affect non-residents, only receive rational basis review. *Id.* at 72, 77 (citing *Holt*, 439 U.S. at 68-70).

Appendix A

The Supreme Court in *Holt* cautioned that there may be limits on the ability to restrict the franchise of non-residents if the city has "annexed outlying territory in all but name." 439 U.S. at 72 n.8 (citing *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir.1975)). We have interpreted *Holt*:

> as meaning that strict scrutiny will be applied to the exclusion of non-residents from the elections of a particular governmental entity only when that unit of government exercises a level of control over the non-residents' lives close to or equal to that which it exercises over those who actually reside within its borders.

English, 301 F.3d at 79.

In *English*, we concluded that the Boonton School Board, the receiving district, does not exercise " 'precisely the same governmental powers over residents of [Lincoln Park (sending district)] as it does over those residing within its [district's] limits.' " 301 F.3d at 79 (quoting *Holt*, 439 U.S. at 72 n.8). Rather, the Boonton Board exercised control over all school matters K-12 for Boonton residents, but only affected Lincoln Park residents on matters involving the high school. Furthermore, the Lincoln Park Board maintained exclusive control over the education of its children from K-8. *English*, 301 F.3d at 79.

The same arrangement applies to the present case. The Somerville Board only exercises authority over Branchburg residents, including the Kovacs Plaintiffs, with regard

to the Somerville High School. Branchburg is free to control the education of its children from K-8, and the reach of Somerville's powers over Branchburg is limited exclusively to the High School. As in *English*, this is not a situation where the powers of Somerville are co-extensive with regard to both Somerville and Branchburg residents. Consequently, as in *English*, we will evaluate the constitutionality of the send-receive statute as applied to Branchburg under rational basis review.

The above analysis is also dispositive of the merits. Our holding in *English* that a state may limit the representation of non-residents on the receiving school board as long as the receiving board exercises a lesser level of control over the non-residents compared to residents, *English*, 301 F.3d at 79, is fully applicable here. The fact that Branchburg cannot sever its relationship with Somerville does not alter our analysis. Whether or not a severance is possible, Somerville still exercises extraterritorial powers over Branchburg "only with respect to their high school-aged children." *Id.* That reasoning was the essence of the rejection in *English* of the constitutional challenge based on the one person, one vote principle. Branchburg's inability to sever the relationship does not affect the limited nature of Somerville's extraterritorial powers.

Branchburg argues that the impossibility of severance is important for determining whether the New Jersey legislature had a rational basis for limiting sending districts' representation on receiving districts' school boards. Appellants point to our language in *English* where, after concluding

that "New Jersey has legitimate reasons for limiting the representation of [the sending district]," we added, "there is always the possibility that [the sending district] might sever its relationship [with the receiving district]." *English*, 301 F.3d at 80. Based on this language, Branchburg argues that its inability to sever the relationship distinguishes it from *English* because the resulting perma-nence of its relationship with Somerville gives Branchburg residents the same vested long-term interest in the Somerville High School as Somerville residents.

It is evident from reading the *English* opinion that our statement about the possibility of severance was not the necessary predicate of the ultimate holding. There were two references to the possibility of severance in the *English* opinion, but both were in the context of the legislature's legitimate reasons for limiting the sending district's representation on the receiving district's school board. *See English*, 301 F.3d at 80, 82. However, the possibility of severance was not the only legitimate basis cited for the statute's structure. Rather, we also noted that a school board's broad authority over the entire school district, authority that goes well beyond matters affecting the high school, warranted the limited representation of a sending district. *Id.* at 80, 82. We stated, "we do not consider it irrational for New Jersey to limit the power of the sending district's representative so as to preserve the receiving district's control over matters that affect the school district as a whole." *Id.* at 82. We went on to state that although the statute may not create the optimal system from a " 'political science standpoint,' " New Jersey is only required to have a legitimate and rational basis for

its legislation. *Id.* at 82-83 (quoting *Holt*, 439 U.S. at 73). Thus, there are other legitimate and rational justifications for limiting a sending district's representation on a receiving district's school board.

Our conclusion here that the possibility of severance does not counsel a different result than in *English* is consistent with the holdings in both *Holt* and *Little Thunder*. In *Holt*, Tuscaloosa exerted its police and sanitary regulations and business licensing requirements over Holt, a small town located beyond Tuscaloosa's city limits. 439 U.S. at 61-62. There was no indication that Tuscaloosa's powers were limited in time or that Holt could take action to escape from Tuscaloosa's extraterritorial powers. However, despite the seemingly permanent nature of Holt's situation, the Supreme Court held that it did not violate the one person, one vote principle of the Fourteenth Amendment. *Id.* at 68-70.

Conversely, in *Little Thunder*, under state law an unorganized county was made subject to the powers of an "attached" organized county. 518 F.2d at 1254. Although the unorganized county could petition the state for recognition as an "organized" county and escape the attached county's authority, the Court of Appeals for the Eighth Circuit held that the statute violated the Fourteenth Amendment. *Id.* at 1258. As long as a governmental unit was exerting power over non-residents that was different from the authority that it had over its own residents, the limitation of representation did not offend one person, one vote. Thus, as in *English*, the temporary or permanent nature of the authority exerted over non-residents was not a deciding factor.

D. The Kovacs Plaintiffs

The Kovacs Plaintiffs explain that while the Branchburg Appellants seek proportional representation, they are seeking the right to vote on Somerville High School budgets and referenda affecting the High School. They state that because this relief was not sought in *English*, where the relief sought was limited to additional representation on the school board, their case is not governed by *English*. This is not persuasive. They fail to provide any legal or logical justification why the type of representation sought should affect our conclusion that the New Jersey send-receive statute does not offend the one person, one vote principle.

The fact that the Kovacs Plaintiffs are seeking the franchise for Somerville school budget and referenda votes does not distinguish it from the analysis in *English*. Indeed, the relief they seek is in some respects greater than that sought by the Branchburg Appellants and in *English*. When Somerville residents vote on the budget and referenda, their vote affects much more than just the High School. The annual budget and referenda, by their nature, usually involve comprehensive and long-term planning that goes far beyond merely the functioning of the High School. For example, any referendum may have an impact on Somerville's entire educational plan and infrastructure, while it would not have an effect on Branchburg's K-8 educational system. Moreover, the inclusion of Branchburg residents in Somerville's regular votes on school budgets and referenda would be an even greater intrusion than increased representation on the Somerville Board. Somerville residents, through budget and referenda votes, do not exercise

" 'precisely the same governmental powers' " over Branchburg residents as they do over themselves. *English*, 301 F.3d at 79 (quoting *Holt*, 439 U.S. at 72 n.8). It follows that the constitutional objection by the Kovacs Plaintiffs to the New Jersey statute must also be rejected for the reasons set forth above.

IV.

CONCLUSION

For the reasons set forth above, we will reverse the District Court's grant of summary judgment to plaintiffs and remand to the District Court with directions to grant summary judgment for the defendants.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DATED AND FILED JULY 2, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No: 98-5557 (AET)
and 99-822 (AET) (Consol.)

BOARD OF EDUCATION of the TOWNSHIP OF BRANCHBURG, GREGORY SCOTT, GERALDINE FELDMAN, PATRICIA BOWERS, ROBERT J. FULTON, JR., BETH KOVACS, CHRISTINE IHLING, STEVEN JANKOSKI,

Plaintiffs,

v.

DAVID LIVINGSTON, Somerset County Superintendent; LEO F. KLAGHOLZ, State Commissioner of Education, and THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey,

Defendants.

MEMORANDUM AND ORDER

THOMPSON, U.S.D.J.

This matter is before the Court on plaintiffs' motion for reconsideration of the Court's May 22, 2001 decision which

ordered that the Branchburg Board of Education appoint six (6) members to the Somerville Board of Education. The motion is opposed by the New Jersey Department of Education and the Board of Education of the Borough of Somerville. The Court decided this motion after considering the written submissions of the parties pursuant to Federal Rule of Civil Procedure 78. For the reasons stated herein, plaintiffs' motion will be DENIED.

Before reaching the merits of a motion for reconsideration, a court must decide whether the arguments are properly raised under Local Rule 7.1(g). The motion may address only those matters of fact or issues of law which were presented to, but not considered by, the court in the course of making the decision at issue. *See SPIRG v. Monsanto Co.*, 727 F. Supp. 876, 878 (D.N.J.), *aff'd*, 891 F.2d 283 (3d Cir. 1989). Thus, matters may not be introduced for the first time on a reconsideration motion. *See, e.g., Resorts Int'l, Inc. v. Greate Bay Hotel and Casino, Inc.*, 830 F. Supp. 826, 831 (D.N.J. 1992); *Egloff v. New Jersey Air Nat'l Guard*, 684 F. Supp. 1275, 1279 (D.N.J. 1988). Absent unusual circumstances, a court should reject new evidence which was not presented when the court made the contested decision. *Resorts Int'l*, 830 F. Supp. at 831 n.3. Moreover, Rule 7.1(g) does not allow parties to restate arguments which the court has already considered; rather, a difference of opinion with the court's decision should be dealt with through the normal appellate process. *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F. Supp. 159, 162 (D.N.J. 1988); *See also Chicosky v. Presbyterian Medical Ctr.*, 979 F. Supp. 316, 318 (D.N.J. 1997); *NL Industries, Inc. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 516

(D.N.J. 1996) ("Reconsideration motions . . . may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.").

In addition, the court will grant a motion for reconsideration only if the movant establishes that the court overlooked dispositive factual matters or controlling legal decisions. *See Starr v. JCI Data Processing, Inc.*, 767 F. Supp. 633, 635 (D.N.J. 1991). Relief under Rule 7.1(g) will be granted "very sparingly." *Maldonado v. Lucca*, 636 F. Supp. 621, 630 (D.N.J. 1986). With these standards in mind, the Court will now turn to plaintiffs' motion for reconsideration.

Plaintiffs argue that the Court's remedy is *per se* unconstitutional and that the Court "overlooked controlling decisions of law which clearly show that the Court's remedial order is unconstitutional." Primarily, plaintiffs cite to decisions discussing permissible and impermissible maximum population deviations.

In reaching its prior decision, the Court considered all relevant case law and all matters of fact presented to the Court. The Court concludes that its decision is fully consistent with constitutional precedent. Although the Court recognizes that plaintiffs disagree with the May 22, 2001 decision, the Court will not reconsider arguments and legal precedent that were previously presented and considered. The proper forum for plaintiffs' arguments is not this Court, but the Third Circuit Court of Appeals. Therefore, for these reasons and for good cause shown,

Appendix B

IT IS on this 2nd day of July 2001,

ORDERED that plaintiffs' motion for reconsideration is DENIED.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DATED MAY 21, 2001 AND FILED MAY 22, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No: 98-5557 (AET)
and 99-822 (AET) (Consol.)

BOARD OF EDUCATION of the TOWNSHIP OF BRANCHBURG, GREGORY SCOTT, GERALDINE FELDMAN, PATRICIA BOWERS, ROBERT J. FULTON, JR., BETH KOVACS, CHRISTINE IHLING, STEVEN JANKOSKI,

Plaintiffs,

v.

DAVID LIVINGSTON, Somerset County Superintendent; LEO F. KLAGHOLZ, State Commissioner of Education, and THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey,

Defendants.

OPINION

THOMPSON, U.S.D.J.

This matter is before the Court on the motion of plaintiffs, the Board of Education for the Township of Branchburg,

Appendix C

Gregory Scott, Geraldine Feldman, Patricia Bowers, and Robert J. Fulton, Jr. ("Branchburg plaintiffs"), for a preliminary injunction restraining the Board of Education for the Borough of Somerville ("Somerville Board") from taking any further official action until the Coat approves a constitutionally permissible remedy and/or implements plaintiffs' proposed interim remedial plan. David Livingston, Somerset County Superintendent, and Leo F. Klagholz, New Jersey State Commissioner of Education ("State defendants") and the Somerville Board oppose plaintiffs' motion and in addition, the Somerville Board has filed a cross-motion for a stay of implementation of any remedy pending appeal.

I. BACKGROUND

In the Court's Opinion entered September 7, 2000, the Court concluded that the Representation Statute, N.J.S.A. 18A:38-8.2, is unconstitutional as applied "because it denies Branchburg citizens the right to elect representatives to oversee the high school education of their children in contravention of the 'one person, one vote' principle." The Court stated in support of its conclusion that the United States Supreme Court has consistently held that citizens have a substantial interest and fundamental right to exercise their right to vote for local school board members where those officials are chosen by the electorate at large. *See Hadley v. Junior College Dish*, 397 U.S. 50 (1969). The Court held that Branchburg's citizens have a substantial interest in the high school education of their children, as well as a right to elect those who will oversee that education. Therefore, the Court concluded, the principle of "one person, one vote" applies in this case.

Appendix C

The Court recognized that the New Jersey Legislature and New Jersey's Commissioner of Education are the proper parties to formulate appropriate remedies in this case and requested that the Commissioner of Education recommend, within sixty (60) days, a constitutionally permissible manner for resolving this problem until the New Jersey Legislature can formulate a legislative solution.

On October 6, 2000, the State defendants filed a Notice of Appeal with the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(a), which allows immediate appeals from orders granting or denying an injunction. On October 13, 2000, the State defendants filed a motion for a stay of the directives contained in the Court's September 7, 2000 Opinion pending appeal pursuant to FED. R. CIV. P. 62(c), which likewise applies only when "an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction." On October 19, 2000, all consolidated plaintiffs filed a motion in the Third Circuit seeking to dismiss the appeal by State defendants for lack of appellate jurisdiction.

On October 26, 2000, the Somerville Board filed a cross-motion requesting that the Court amend its September 7, 2000 Order to include a 28 U.S.C. § 1292(b) statement and a stay pending appeal. On November 1, 2000, the Court entered a letter order granting the State defendants' request for a one week extension of the 60-day time period contained in the September 7, 2000 Opinion. Thus, the State defendants were given until November 13, 2000 to fulfill the Court's request that it recommend a constitutionally permissible resolution to this matter.

Appendix C

By Order entered November 29, 2000, the Court granted the Somerville Board's motion to amend the September 7, 2000 Order to certify the Court's decision for an interlocutory appeal and granted the Somerville Board's motion for a stay of the Court's September 7, 2000 decision pending appeal. The Court dismissed the State defendants' motion for a stay pending appeal as moot based on its rulings on the Somerville Board motions.

By order entered December 6, 2000, plaintiffs' motion to dismiss the State defendants' appeal was granted by the Third Circuit Court of Appeals. Thereafter, by order entered January 24, 2001, the Third Circuit denied the Somerville Board's petition for an interlocutory appeal.

On February 28, 2001, the Branchburg plaintiffs filed this motion for a preliminary injunction restraining the Somerville Board from taking any further official action until the Court approves a Constitutionally permissible remedy and/or implementing plaintiffs' proposed interim remedial plan. The State defendants and the Somerville Board oppose plaintiffs' motion and in addition, the Somerville Board has filed a cross-motion for a stay of implementation of any remedy pending appeal.

By letter received April 5, 2001, the Court received notice that the Third Circuit had denied the Somerville Board's petition for a rehearing *en banc*. On April 12, 2001, the Court issued an Order to Show Cause regarding the Branchburg plaintiffs' motion and vacated the stay in place pending appeal.

Appendix C

II. DISCUSSION

A. Preliminary Injunction

1. *Preliminary Injunction Standard*

Injunctive relief is an "extraordinary remedy" that should only be granted in limited circumstances. *See AT&T v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994), *cert. denied*, 514 U.S. 1103 (1995). In determining whether to grant a preliminary injunction, the Court must assess the following four factors: (1) the likelihood that the plaintiff will prevail on the merits; (2) the extent to which the plaintiff is suffering irreparable harm; (3) the extent to which the requested relief would irreparably harm the defendant; and (4) the public interest. *See New Jersey Hospital Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995). A preliminary injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief. *See Opticians Ass'n of America v. Independent Opticians of America*, 920 F.2d 187, 192 (3d Cir. 1990).

2. *Likelihood of Success on the Merits*

The court has already granted the Branchburg plaintiffs' motion for summary judgment finding that plaintiffs' Constitutional rights have been infringed by application of the Representation Statute, N.J.S.A. 18A:38.8.2. Therefore, the Court finds that plaintiffs' have a likelihood of success in the litigation. See *Waldman*, 73 F.3d at 512.

3. *Irreparable Harm*

To demonstrate irreparable harm, a moving party must demonstrate a potential harm that cannot be redressed by a legal or equitable remedy at the conclusion of the matter. *See Gruntal & Co., Inc. v. Steinberg*, 854 F. Supp. 324, 341 (D.N.J. 1994), *aff'd* 46 F.3d 1116 (3d Cir. 1994).

The Branchburg plaintiffs argue that the violation of plaintiffs' constitutional rights constitutes irreparable harm *per se*. *See Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 880 (3d Cir. 1997); *Marks v. Stinson*, 19 F.3d 873, 878-79 (3d Cir. 1994). Defendants argue that the principle of "one person, one vote" extended across district boundaries is not a well established constitutional right and therefore a violation of that right would not constitute *per se* irreparable harm. Defendants further argue that because the Court will eventually fashion some remedy by the end of the case, the Branchburg plaintiffs an not suffering irreparable harm within the meaning of *Gruntal*.

The Court finds that the principle of "one vote, one person" is a well established right and that as the Somerville Board continues to meet to establish policy and make decisions affecting the Branchburg high school pupils without adequate representation by Branchburg, the Branchburg plaintiffs are suffering and continue to suffer irreparable harm.

4. *Balance of Equities and Public Interest*

In addition, a moving party must demonstrate that the irreparable harm caused to it by the lack of an injunction

will outweigh the harm caused to the opposing party if relief is granted. *See Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc.*, 143 F.3d 800, 806 (3d Cir. 1998).

The Branchburg plaintiffs argue that any administrative costs defendants must bear as a result of an injunction do not compare to the constitutional deprivations they have suffered. Defendants argue that if the Court grants a preliminary injunction restraining the Somerville Board from taking any further official action, the entire Somerville school district would be paralyzed and all Somerville students and all Branchburg high school students would be deprived of their right to a thorough and efficient education. In addition, defendants argue that if the Court imposes the Branchburg plaintiffs' proposed plan giving Branchburg a majority vote, the franchise of the Somerville voters would be seriously impacted.

The Court does not intend to issue an injunction that will result in shutting down the Somerville school district. As a result, any remedy the Court would impose would allow the Somerville Board to continue operating to fulfill its obligation to provide a thorough and efficient education to the students. Therefore, the violation of the Branchburg plaintiffs' constitutional rights outweighs any harm defendants would suffer as a result of the Court imposing the Branchburg plaintiffs' interim plan or some version of the plan. In addition, the Court finds that the public interest will be served if the constitutional rights of the Branchburg plaintiffs are protected in a manner that does not impact the Somerville and Branchburg students' rights.

Appendix C

B. Proposed Remedies

1. *Current Composition of Somerville Board*

Pursuant to N.J.S.A. 18A:38-8.2, currently the Branchburg Board appoints one (1) member to the 10 member Somerville Board. The Branchburg member is entitled to vote upon certain issues affecting the high school including capital spending and teacher dismissal. The votes of each member of the Somerville Board are equally weighted.

The Somerville Board meets a minimum of two (2) times per month in order to set long-range and short-range policy and also to see to the basic running of the school district which involves many tasks from paying bills to labor negotiations to facility maintenance. In addition, additional monthly committee meetings are held, i.e., athletics and policy committee, building and grounds committee, curriculum committee, etc.

2. *Plaintiffs' Proposed Interim Plan*

As an interim remedy until the state legislature can adequately address the problem, the. Branchburg plaintiffs propose that the Branchburg Board appoint five (5) members to the Somerville Board, each of whom would have two (2) votes on matters identified in N.J.S.A. 18A:38-8.1[1] The

---

1. N.J.S.A. 18A:38-8.1 states that the representative of the sending district shall be eligible to vote on the following matters before the receiving district board of education:

(Cont'd)

Somerville Board members would continue to have one (1) vote each. The Branchburg plaintiffs' proposed plan would give Branchburg a majority vote on the issues listed in N.J.S.A. 18A:38-8.1 (10 Branchburg votes (53%) to 9 Somerville votes (47%)). Branchburg students currently comprise 55% of the Somerville district's high school student population, while students from Somerville account for 45%.

3. *N.J.S.A.18A:38-8.4*

In response to the Court's request, the New Jersey State Commissioner of Education proposed that the Court model its remedy after N.J.S.A. 18A:38-8.4 which was enacted in 1999 regarding the send-receive relationship between the Upper Township Board of Education and the Ocean City Board of Education. In that send-receive relationship, the Upper Township students comprised more than 50%

(Cont'd)

a. Tuition to be charged in sending district by the receiving district and the bill lists or contracts for the purchase, operation or maintenance of facilities, equipment and instructional materials to be used in the education of the pupils of the sending district;

b. New capital construction to be utilized by sending district pupils;

c. Appointment, transfer or removal of teaching staff members providing services to pupils of the sending district, including any teaching staff member who is a member of the receiving district's central administration staff; and

d. Addition or deletion of curricular and extracurricular programs involving pupils of the sending district.

of the high school student population but only appointed (1) representative on the Ocean City Board of Education. Section 8.4 provides a sliding scale in which a sending district whose students comprise at least 40% of the total enrollment of pupils can have three (3) representatives on the receiving district's board of education. Section 8.4 also provides that the sending district representatives would be added in addition to the members of the receiving district's board and that the sending district representatives would be permitted to vote on those matters authorized by N.J.S.A. 18A:38-8.1. Section 8.4 was agreed on in advance by both districts and the constitutional issues regarding voter representation were not considered.

4. *The Court's Proposed Remedy*

In the Court's September 7, 2000 Opinion, the Court concluded that the principle of "one person, one vote" applies in this case. The Court father noted that defendants raised valid concerns regarding the possible remedies that might be imposed in this case. "For example, allowing Branchburg to have a controlling majority on the Somerville Board would seriously impact the franchise of Somerville voters." Op. Thompson, Sept. 7, 2000 at 6. The Court also recognized that the New Jersey Legislature and New Jersey's Commissioner of Education are the proper parties to formulate appropriate remedies in this case. *See Township of Marlboro v. Board of Educ. of the Freehold Regional High School*, 992 F. Supp. 756, 765 (D.N.J. 1998). In that light, the Court requested that the Commissioner of Education propose a remedy and also requested that the parties enter into a standstill agreement as to the operation of the Somerville

Board which "would not delay or interfere with the ongoing education program of the districts." Op. Thompson, Sept. 7, 2000 at 6-7. The parties have been unable to agree on a standstill agreement and the Branchburg plaintiffs now seek an injunction implementing a remedial plan.

The Court notes that while Branchburg students currently comprise 55% of the Somerville district's high school student population, many issues affecting the Branchburg high school students also affect the entire Someville school district including the Somerville grammar schools and middle school which do not accept Branchburg students. For example, pursuant to N.J.S.A. 18A:38-8.1, the Branchburg representative is permitted to vote on issues regarding the Somerville district central administrative staff. Such decisions affect the entire Somerville school district of which, Branchburg does not possess a majority of the total pupil population.

The Court further notes that NJ.S.A. 18A:38-8.4 does not specifically apply to this situation. The statute was enacted with the prior approval of both districts and the issues of voter representation were not considered. Under the Section 8.4 sliding scale, Branchburg would appoint three (3) representatives to the Somerville Board which would constitute 25% of the Somerville Board votes. However, while such a scheme gives Branchburg more representation than it currently has on the Somerville Board, a large disparity in voter representation would still exist in stark contradiction to the Court's finding that the principle of "one person, one vote" applies in this case.

The Court notes that the send-receive relationship differs from the regional district situation. There is an underlying contract at issue here but there are also constitutional rights at stake. The current situation is complex and the Court cannot conceive of a perfect solution. As a result, the Court will order that Branchburg appoint six (6) members to the Somerville Board to vote on the matters listed in N.J.S.A. 18A:38-8.1. The six (6) Branchburg members will be in addition to the nine (9) Somerville members. As a result, the Branchburg members will control 40% of the votes on the matters affecting the Branchburg high school students as listed in Section 8.1. Therefore, the Somerville members will maintain a majority vote and the Branchburg district will have significantly more representation on issues affecting their high school students.

C. Defendants' Motion for a Stay Pending Appeal

Pursuant to FED. R. CIV. P. 62(c), the Somerville Board seeks a stay of the Court's remedial order pending appeal. To warrant a stay pending appeal, the Somerville Board must demonstrate: (1) the likelihood that they will prevail on the merits of the appeal; (2) irreparable injury absent a stay; (3) other parties will not be harmed by the stay; and (4) the public interest favors granting the stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Kawecki Berylco Industries, Inc. v. Fansteel, Inc.*, 517 F.Supp. 539, 540 (E.D. Pa. 1981), *aff'd* 676 F.2d 686 (3d Cir. 1982).

The Court finds that the Somerville Board has failed to show irreparable harm absent a stay. Under the Court's remedial plan, the Somerville Board maintains a majority

vote and the Somerville Board may continue to operate. In addition, as the Somerville Board continues to meet to establish policy and make decisions affecting the Branchburg students, staying the implementation of the Court's remedial plan will allow the irreparable harm the Branchburg plaintiffs demonstrated in support of the motion for preliminary injunction to continue. Therefore, the Somerville Board's motion for a stay pending appeal will be denied.

III. CONCLUSION

For these reasons and for good cause shown, the Branchburg plaintiffs' motion for a preliminary injunction will be granted and the Somerville Board's motion for a stay pending appeal will be denied. As a result, the Court will order that Branchburg appoint six (6) members to the Somerville Board who will be permitted to vote on matters affecting the Branchburg high school student listed as in N.J.S.A. 18:38-8.1. An appropriate Order will be filed with this Opinion.

Dated: 5/21/01

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No: 98-5557 (AET)
and 99-822 (AET) (Consol.)

BOARD OF EDUCATION of the TOWNSHIP OF BRANCHBURG, GREGORY SCOTT, GERALDINE FELDMAN, PATRICIA BOWERS, ROBERT J. FULTON, JR., BETH KOVACS, CHRISTINE IHLING, STEVEN JANKOSKI,

Plaintiffs,

v.

DAVID LIVINGSTON, Somerset County Superintendent; LEO F. KLAGHOLZ, State Commissioner of Education, and THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey,

Defendants.

ORDER

For the reasons set forth in the accompanying Opinion, and for good cause shown,

IT IS on this 21st day of May, 2001,

ORDERED that the motion for a preliminary injunction filed by the Branchburg plaintiffs is GRANTED; and it is further

Appendix C

ORDERED that the Somerville Board's motion for a stay of the implementation of the Court's interim remedial plan pending appeal pursuant to Fed. R. Civ. P. 62 (c) is DENIED; and it is further

ORDERED that the following interim remedial plan be implemented until the New Jersey state legislature can pass new legislation to address this matter:

- Branchburg Board of Education appoints six (6) members to the Somerville Board of Education.

- Each Branchburg member receives one (1) vote on issues affecting the Branchburg high school students as listed in N.J.S.A. 18A:38.8.1.

- The six (6) Branchburg members are added to the Somerville Board of Education in addition to the nine (9) Somerville members.

- Each Somerville member continues to receive one (1) vote each on all issues before the Somerville Board.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED SEPTEMBER 5, 2000 AND FILED SEPTEMBER 7, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No: 98-5557 (AET) (Consol.)

BOARD OF EDUCATION of the TOWNSHIP OF BRANCHBURG, GREGORY SCOTT, GERALDINE FELDMAN, PATRICIA BOWERS, ROBERT J. FULTON, JR., BETH KOVACS, CHRISTINE IHLING, STEVEN JANKOSKI,

Plaintiffs,

v.

DAVID LIVINGSTON, Somerset County Superintendent; LEO F. KLAGHOLZ, State Commissioner of Education, and THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey,

Defendants.

OPINION

THOMPSON, U.S.D.J.

These matters are before the Court on cross motions for summary judgment filed by all parties. At issue in this case

is a New Jersey statute regarding representation on local school boards and the doctrine of "one person, one vote". The Court decided these matters after hearing oral argument on July 6, 2000.

BACKGROUND

The facts of this case are not in dispute. Public schools in New Jersey are organized into geographic areas called school districts. Each school district is required to provide education, at its own expense, to the students domiciled within the district. However, where a given district does not have high school facilities, that district must designate a high school outside the district to receive its high school students, pursuant to the following statutory language:

> The board of education of every school district which lacks high school facilities within the district and has not designated a high school or high schools outside of the district for its high school pupils to attend shall designate a high school or high schools of this state for the attendance of such pupils.

N.J. STAT. ANN. § 18A:38-11. Another New Jersey statute permits school districts to receive such students. N.J. STAT. ANN. § 18A:38-8. When two school districts enter into an agreement whereby the students of the sending district attend school in the receiving district, such an agreement is commonly called a send-receive relationship.

Appendix D

When sufficient numbers of students from one district attend school in another district, the sending district is entitled to representation on the receiving district's school board as follows:

> A school district which is sending pupils to another school district pursuant to § 18A:38-8 shall have representation on the board of education of the receiving school district as follows:
>
> a. (1) If the pupils of the sending district comprise less than 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have no representation on the receiving district board of education.
>
> (2) If the pupils of the sending district comprise at least 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have one representative on the receiving district board of education.

N.J. STAT. ANN. § 18A:38-8.2 (the "Representation Statute" or "Statute").

As an alternative to creating a send-receive relationship, a school district may also seek to form a regional school district with other area school districts. A regional school

district is a separate political entity which is jointly controlled by its constituent districts. N.J. STAT. ANN. § 18A:13-4, 13-5, 13-8. School districts must follow a statutory procedure to forma regional school district, which includes consultation with the State Commissioner of Education and a referendum vote. N.J. STAT. ANN. § 18A:13-34.

In 1956, the Branchburg Board and the Somerville Board entered into a send-receive relationship. This agreement allowed students from Branchburg to attend Somerville's high school and provided for tuition payments from Branchburg to Somerville to cover the education costs for those students. Branchburg entered into this Agreement because it did not have a high school in its borders, while Somerville had a high school large enough to accommodate students from both the Branchburg and Somerville districts.

The parties agree that during the 1997-98 school year, Branchburg sent 432 students to attend high school in the Somerville district. That same year, 366 students domiciled in Somerville went to high school in their own district. Thus, Branchburg students accounted for approximately 55% of the Somerville district's high school student population, while students from Somerville accounted for 45%. The parties also agree that these percentages remain virtually the same today.

Under the Representation Statute, given this ratio of students, the Branchburg Board appointed one member to the 10 member Somerville Board. The Branchburg member is entitled to vote upon certain issues, including capital

spending and teacher dismissal. N.J. STAT. ANN. § 18A:38-8.1. The votes of each member of the Somerville Board are equally weighted.

Plaintiffs are requesting a declaration that N.J.S.A. 18A:38-8.2 is unconstitutional as it applies to the send-receive relationship between Branchburg and Somerville. More specifically, plaintiffs contend that the statute is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Sections 1 and 5 of the New Jersey Constitution.

DISCUSSION

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In this case, the Court will draw all reasonable inferences in plaintiffs' favor, and will accept plaintiffs' evidence when considering the merits of the summary judgment motions. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986).

Defendants argue that before the Court considers the merits of this case, it should first consider whether plaintiffs should be constitutionally estopped from pursuing their claims. Defendants assert that it would be improper to allow plaintiffs to challenge the Representation Statute while still enjoying the benefits of the Statute, such as representation on the Somerville Board.

Appendix D

Constitutional estoppel does not attach where a given plaintiff enjoys a limited benefit under a challenged statute or government program, while the plaintiff is simultaneously suffering constitutional harm. *See S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 768 (11th Cir. 1991) (subsequent history omitted). In this case, plaintiffs have utilized the Representation Statute in the past to send high school students to Somerville. However, as will be seen below, the Representation Statute now burdens plaintiffs' voting rights, and therefore, plaintiffs are permitted to challenge the Statute.

The Court concludes that the Representation Statute is unconstitutional as applied because it denies Branchburg citizens the right to elect representatives to oversee the high school education of their children in contravention of the "one person, one vote" principle. The United States Supreme Court has consistently held that citizens have a substantial interest and fundamental right to exercise their right to vote for local school board members where those officials are chosen by the electorate at large. *See generally Hadley v. Junior College District*, 397 U.S. 50 (1969).

Branchburg's citizens have a substantial interest in the high school education of their children, as well as a right to elect those who will oversee that education. The principle of "one person, one vote" applies in this case. Although Branchburg's citizens do not live within the Somerville School District, their right to elect a local school board to oversee the education of their children who attend high school in Somerville is not diminished. This is not a case where the Somerville Board's activities have an "indirect extraterritorial

effect" on the citizens of Branchburg and their children. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69-70 (1978). Nor is this a case where the Somerville Board exercises only limited powers over the educational lives of its students. The Somerville Board is the governing body for the entire Somerville School District, including Somerville's high school. *See Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1102-03 (7th Cir. 1995) (considering local school counsels which exercised limited powers over a single school with oversight from Chicago school board).

The parties agree that the Somerville Board makes crucial decisions regarding curriculum, hiring and firing of teachers, supervision and discipline of students, and facilities management. In addition, Branchburg's citizens pay a per pupil cost to Somerville which is based, at least in part, on debt service approved by Somerville's voters. These factors have more then an incidental effect on Branchburg citizens. They *directly* impact the future of Branchburg's children and the amount of money flowing from Branchburg to Somerville. In fact, Branchburg and Somerville citizens both have an identical interest in the education provided at Somerville's High School. The geographic political boundary between the Somerville and Branchburg Districts does nothing to change this identical level of interest. *See Evans v..Cornman*, 398 U.S. 419, 426 (1969) (noting residents of federal enclave had just as much interest in elections as residents living in state surrounding enclave); *Little Thunder v. State of South Dakota*, 518 F.2d 1253, 1255-56 (8th Cir. 1975).

Appendix D

The Court is aware that individual states should be given room to experiment with the allocation of state and local power. *See Holt*, 439 U.S. at 71. However, in this case, each representative from Somerville on Somerville's Board represents approximately 1,258 people, while the single Branchburg representative represents 14,782 people. This representation scheme appears to violate the principle of "one person, one vote", and would therefore be unconstitutional.

Defendants have raised valid concerns regarding the possible remedies that might be imposed in this case. For example, allowing Branchburg to have a controlling majority on the Somerville school board would seriously impact the franchise of Somerville voters. The Court also recognizes that the New Jersey Legislature and New Jersey's Commissioner of Education are the proper parties to formulate appropriate remedies in this case. *See Township of Marlboro v. Board of Educ. of the Freehold Regional High School*, 992 F. Supp. 756, 765 (D.N.J. 1998).

In light of this, the Court will ask the Commissioner of Education to recommend within 60 days a constitutionally permissible manner for resolving this problem until the New Jersey Legislature can formulate a legislative solution. The Court will also ask the parties to draft a mutually acceptable standstill agreement as to the operations of the Somerville Board, which will not delay or interfere with the ongoing education program of the districts. Plaintiffs' request for attorneys fees will be considered at a later time.

Appendix D

CONCLUSION

For the reasons given above, plaintiffs' motions for summary judgment will be granted and defendants' motions for summary judgment will be denied. An appropriate Order will be filed with this Opinion.

Dated: Sept. 5, 2000

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No: 98-5557 (AET) (Consol.)

BOARD OF EDUCATION of the TOWNSHIP OF BRANCHBURG, GREGORY SCOTT, GERALDINE FELDMAN, PATRICIA BOWERS, ROBERT J. FULTON, JR., BETH KOVACS, CHRISTINE IHLING, STEVEN JANKOSKI,

Plaintiffs,

v.

DAVID LIVINGSTON, Somerset County Superintendent; LEO F. KLAGHOLZ, State Commissioner of Education, and THE BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, A Body Politic of the State of New Jersey,

Defendants.

ORDER

For the reasons given in the Opinion filed with this Order,

It is on this 5th day of Sept., 2000,

ORDERED that plaintiffs' motions for summary judgment are **GRANTED**; and it is further,

Appendix D

ORDERED that defendants' motions for summary judgment are **DENIED**.

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.